

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PASOR DEVELOPMENT CORP.	:	DETERMINATION
	:	DTA NO. 816307
For Revision of a Determination or for Refund of Tax	:	
on Gains Derived from Certain Real Property Transfers	:	
under Article 31-B of the Tax Law.	:	

Petitioner, Pasor Development Corp., 1075 East 72nd Street, Brooklyn, New York 11234, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 14, 1998 at 11:00 A.M., with all briefs to be submitted by March 12, 1999, which date began the six-month period for the issuance of this determination. Petitioners appeared by Joseph R. Sorrentino, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly disallowed a portion of petitioner's claimed acquisition cost for certain real property on the basis that the transfer of such property to petitioner was, in part, a mere change in the identity of the property owners.

II. Whether petitioner may increase its original purchase price for certain real property by inclusion of construction supervisory fees and additional claimed indirect project costs.

III. Whether petitioner may reduce the consideration received upon its sale of certain real property by six percent of the selling price for such property representing the value of petitioner's principals' sales efforts.

IV. Whether, in the event petitioner prevails on any of the foregoing issues and is entitled to a refund, interest should be calculated thereon from the date of petitioner's first condominium unit sale.

FINDINGS OF FACT

1. In 1986, Rochelle Pazer and Neil Sorrentino purchased, as tenants in common, certain real property located at 8602-8624 Avenue L, Brooklyn, New York ("the property") for \$257,000.00.

2. In February 1987, Ms. Pazer and Mr. Sorrentino formed petitioner, Pasor Development Corporation ("Pasor"), contributing \$5,000.00 each in return for which each received 50 percent of the capital stock of Pasor.

3. At some point prior to June 1987, Ms. Pazer and Mr. Sorrentino were approached by one John Martinelli, who was not previously known to either of them. Mr. Martinelli presented himself as an experienced condominium developer and offered Ms. Pazer and Mr. Sorrentino \$990,000.00 to purchase the property outright. This offer was refused.

4. By an agreement dated June 27, 1987, Ms. Pazer, Mr. Sorrentino and Mr. Martinelli formed a joint venture known as Avenue L Joint Venture. Ms. Pazer and Mr. Sorrentino claimed it was intended that the joint venture would purchase the property from the individual owners (Ms. Pazer and Mr. Sorrentino) and develop the property into condominium units. Notwithstanding this stated intent, the property purchase by the joint venture did not occur. Rather, Paragraph 18 of the joint venture agreement indicates that Pasor would hold legal title to

the property as nominee of and for the benefit of the joint venture. Paragraph 27 of the joint venture agreement provides that Mr. Martinelli would pay \$333,333.33 to Ms. Pazer and Mr. Sorrentino to purchase a one-third interest in the joint venture. Paragraph 26 provides that Mr. Martinelli would receive \$40,000.00 to manage the construction and development of the property.

5. At some later point in 1987, Mr. Martinelli became a one-third owner of Pasor, with Ms. Pazer and Mr. Sorrentino each, as a result, becoming one-third (as opposed to one-half) owners of Pasor. Documents in the record indicate that Mr. Martinelli held the title of president and Ms. Pazer held the title of vice-president of Pasor. The Division alleges that Mr. Martinelli paid \$333,330.00 to acquire this ownership interest in Pasor, while petitioner maintains that at no time did Mr. Martinelli pay such sum for his ownership interest in Pasor. The record is unclear as to what amount, if any, Mr. Martinelli may have directly paid to or invested in Pasor in return for his one-third interest therein. Instead, the trail provided by the record shows only that Mr. Martinelli paid \$333,333.33 for a one-third interest in the joint venture, and that he later acquired or received a one-third stock ownership interest in petitioner, the entity which was to hold legal title to the property as nominee for the benefit of the joint venture. In any event, however, the property itself continued to be owned by Ms. Pazer and Mr. Sorrentino, as tenants in common.

6. In December 1988, Ms. Pazer and Mr. Sorrentino entered into a contract to transfer the property to Pasor for \$990,000.00. The property transfer occurred in June 1989, with the source of funds for Pasor's acquisition of the property being the proceeds of a loan in the amount of \$1,500,000.00 taken by Pasor from the Home Federal Savings Bank. The selling price for the property was allegedly based on the \$990,000.00 amount offered by Mr. Martinelli, as noted

previously. Ms. Pazer and Mr. Sorrentino reported their transfer of the property on their individual income tax returns for 1989.¹

7. In September 1987, Pasor commenced construction of a 32-unit condominium project, known as Rochelle Court Condominium Project, on the property. The project consisted of eight buildings with four condominium units in each building. According to Ms. Pazer and Mr. Sorrentino, it was initially intended that Mr. Martinelli would build the entire project. However, it became clear shortly after starting construction that it would not be possible for him to complete the project alone. As a result, both Ms. Pazer and Mr. Sorrentino became involved in the project. According to their testimony, they and Mr. Martinelli together “did everything for the project” from start to finish, including planning, obtaining required governmental permits, receiving bids, hiring and scheduling subcontractors, and selling the units.

8. Condominium units were sold and transferred from October 1988 through June 1994 when the final unit was transferred. It is undisputed that the condominium sales market was generally favorable at the time of the first sales, but had turned and was generally unfavorable by the time of the last sales, with selling prices having dropped well below the prices which had originally been anticipated for the units.

9. Petitioner submitted its real property transfer gains tax (“gains tax”) initial filings and updates on the project at the required times.² Petitioner made its filings on the basis of estimates

¹ Ms. Pazer and Mr. Sorrentino filed Federal income tax returns (Form 1040) for 1989. At Schedule D, line 9-d thereon, each lists “Land-Pasor Dev.,” with an acquisition date of October 1986 and a sale date of June 30, 1989. The listed selling price is \$495,000.00 each (totaling \$990,000.00) versus a cost of \$271,000.00 each (totaling \$542,000.00), thus resulting in an income tax gain of \$224,000.00 each to Ms. Pazer and Mr. Sorrentino (totaling \$448,000.00)

² The gains tax imposed under Tax Law former Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

of the anticipated selling prices for the units, but did not make its estimates under the so-called “safe harbor” option.³

10. After petitioner’s last gains tax filing update in December 1994, the Division of Taxation (“Division”) completed a desk audit of the project. Thereafter, the Division issued to petitioner a Notice of Determination, dated September 30, 1996, indicating additional gains tax due in the amount of \$17,597.70 plus interest. Petitioner challenged the notice and, following a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”), the amount of tax due was reduced to \$11,300.90, plus interest, based on petitioner’s substantiation of \$62,968.00 in claimed capital improvement costs paid to subcontractors.

11. Petitioner continued its challenge to the Notice of Determination by filing a petition with the Division of Tax Appeals. In the course of the instant proceedings, petitioner has clarified its position that it seeks annulment of the Notice of Determination and a refund of tax paid in the amount of \$102,409.30, plus interest. The Division has conceded the timeliness of petitioner’s refund claim, which is based on the assertion that the Division improperly disallowed certain project expenses consisting of a portion of the acquisition cost of the property, construction supervision cost, indirect expenses and selling expenses. The nature of these claimed expense items, and their respective dollar amounts, are discussed below.

ACQUISITION COST--\$399,677.00

12. Petitioner claims that it is entitled to include in its original purchase price (“OPP”) for the property the entire \$990,000.00 amount petitioner paid to Ms. Pazer and Mr. Sorrentino upon

³ Under safe harbor, when a taxpayer followed certain guidelines in calculating its estimated selling prices and expenses, and consequently its gain subject to tax, it would be held harmless from the imposition of penalties if its actual selling prices and expenses differed from its estimates thereby resulting in greater than estimated gain and tax liability (*see*, TSB-M-86-[2]-R).

their transfer of the property to petitioner. The Division, however, concluded that since, at the time of transfer, Ms. Pazer and Mr. Sorrentino owned two-thirds of petitioner (Mr. Martinelli was the other one-third owner at the time of transfer), 67 percent of the ownership of the property simply underwent a mere change of identity upon its transfer to petitioner. Consequently, the Division allowed acquisition OPP of \$590,333.00, consisting of the \$333,333.00 paid by Mr. Martinelli (*see*, Finding of Fact “5”) plus the \$257,000.00 originally paid by Ms. Pazer and Mr. Sorrentino for the property (*see*, Finding of Fact “1”). The Division maintains that there was no change in beneficial ownership interest for 67 percent of the property, hence no taxable event with respect thereto, and disallowed petitioner’s claim to step-up its OPP.

13. In contrast, petitioner claims that the transfer was a bonafide sale, that Ms. Pazer and Mr. Sorrentino each reported the transfer as a sale for income tax purposes, and that the selling price represented a fair market price as established by Mr. Martinelli’s original offer to purchase the property outright. Petitioner maintains that the transfer did not occur upon its organization in exchange for its stock, and that as a result of the transfer, neither of the transferors held a controlling interest in petitioner. Accordingly, petitioner argues that its OPP for the property should include the full \$990,000.00 amount paid.

CONSTRUCTION SUPERVISORY FEES--\$476,000.00

14. Petitioner asserts the Division improperly disallowed construction supervisory fees totaling \$476,000.00 allegedly paid to Ms. Pazer, Mr. Sorrentino and Mr. Martinelli. According to testimony by Ms. Pazer and Mr. Sorrentino, Mr. Martinelli had experience in building condominium projects, and originally was to develop the entire project as the construction manager for a payment of \$40,000.00. However, it became apparent early on that it would not be possible for him to do so alone. Ms. Pazer and Mr. Sorrentino explained that they realized they

would have to be involved in order to complete the project, that they decided to do the work themselves “to save every possible penny,” and as a result spent three years on the job every day, and “did everything from start to finish” for the project. Ms. Pazer noted that she learned the building business from her father, who was involved in constructing commercial buildings, while Mr. Sorrentino explained that he has an extensive background in residential construction. They stated that this realization of their need to become fully involved in the project occurred in 1987 at the start of the project, and that at such time they discussed their pay to run the project. Their initial discussion was that they would be paid between \$150,000.00 to \$200,000.00 each for their construction supervision activities, depending on how long the project took to complete. Both Ms. Pazer and Mr. Sorrentino further testified that they ultimately orally agreed to pay themselves and Mr. Martinelli \$172,000.00 each for their services, and that this oral agreement was reached in 1987 when they commenced working full time on the project.

15. Ms. Pazer and Mr. Sorrentino entered into a written supervisor’s agreement with petitioner dated January 28, 1989. This agreement provides for each of these two individuals to act as a project supervisor, with each to be paid a fee of \$172,000.00. The agreement specifies that this payment was a fee and was not a salary for supervisory work, and that the supervisors were to perform all activities including selling the project. While the agreement does not state as much in its terms, Ms. Pazer and Mr. Sorrentino testified that the agreement was merely a memorialization of their earlier oral agreement for payment of \$172,000.00 each, allegedly arrived at after the three joint venturers held discussions about the amount of money they should be paid for their work in carrying out the project.

16. Petitioner’s claim for supervisory payments totals \$476,000.00, calculated as three times \$172,000.00 (\$516,000.00) less the \$40,000.00 amount payable to Mr. Martinelli under the

joint venture agreement. The Division allowed the \$40,000.00 amount on audit, but denied the \$476,000.00 balance.

17. In support of the claim for supervisory fees, petitioner points to a listing in its 1990 year end trial balance recording “loans payable” of \$172,000.00 each to N. Sorrentino, “R. Paser” [sic] and “JJR.” Petitioner asserts that the listing “loans payable” reflects the method used to record the amount that the corporation felt the three individuals should have been earning on the job but were not being paid because the money was not available for payment until such time as unit sales commenced. Petitioner also points to a pencil copy of Avenue L Joint Venture’s 1990 Form 1065 Partnership Return at line “1” (“Gross Receipts or Sales”) where the sum of \$344,000.00 appears. Petitioner claims this document shows that \$172,000.00 each was paid to Ms. Pazer and Mr. Sorrentino, by Pasor, through the joint venture. In turn, Schedules K-1 from the joint venture for each of these two individuals show a distributive share of \$150,000.00 (to each) at line “1”, which together equals the \$300,000.00 net ordinary income (\$344,000.00 less certain expenses) shown on the Form 1065 for the joint venture.

No explanation was offered to account for any payment of \$172,000.00 to Mr. Martinelli through the joint venture of which he was allegedly a member, nor is any explanation given for the listing on the trial balance of the amount of \$172,000.00 to “JJR” under the heading “loans payable,” or tying the same to Mr. Martinelli. Similarly, no explanation is offered with regard to another trial balance entry of “loan payable” in the amount of \$60,000.00 to “Scott Village.”

18. On the issue of supervisory fees, petitioner also presented the expert testimony of Herbert Sylvester, an engineer with extensive experience in construction management of similar sized and larger condominium projects in the New York City metropolitan area. Mr. Sylvester described the various stages of a project such as Rochelle Court, from land acquisition through

planning and approvals, bidding, actual construction, and on to final completion. He stated that a project of this size would typically employ a construction manager, at a pay rate of approximately \$100,000.00 per year, a job superintendent at a rate of approximately \$75,000.00 per year, and an assistant job superintendent at a rate of approximately \$60,000.00 per year. He explained the roles of each of these three individuals, and stated that a project of this size would take between two and three years in total to complete, with the time from post-permit groundbreaking to construction completion being about one year. Mr. Sylvester concluded that given the typical supervisory expense of \$235,000.00 per year, petitioner's claim of \$172,000.00 to each of the three individuals over the entire period of the project was very reasonable in amount.

19. The Division allowed the \$40,000.00 payable to Mr. Martinelli under the joint venture agreement, but disallowed the balance of petitioner's claim for the construction supervisory fees on the basis that the same were not broken down or described in any detail. The Division maintains that it is unclear what services were performed by the individuals in return for the claimed payment, other than the general statement that they "did everything." The Division also points out that the amounts could have been loan repayments to petitioner's principals (at least to Ms. Pazer and Mr. Sorrentino), given the manner in which they were shown on the trial balance (i.e., as loans payable). Finally, the Division notes that the only documentary evidence supporting any payment to Mr. Martinelli is the joint venture agreement calling for the \$40,000.00 payment which was allowed on audit. Petitioner asserts, in contrast, that since the claimed expenses were contracted for at the beginning of the project, and were merely memorialized later in the supervisory agreement, there should be no bar to their inclusion in OPP.

INDIRECT COSTS--\$305,804.00

20. Petitioner seeks to include additional indirect costs of the project, including items such as secretarial salaries (as opposed to construction maintenance salaries), telephone, electric, tools, rentals and survey expenses. Petitioner claims these items were erroneously omitted by its now deceased first accountant, and asserts that they are includable since Rochelle Court was petitioner's only project thereby leaving all costs incurred thereon as includable costs. Petitioner also claims that these costs were substantiated by copies of bills and canceled checks presented at audit.

21. The Division has denied these additional claimed indirect costs, maintaining that the same were not substantiated. The Division notes that petitioner submitted at hearing only a one-page summary sheet listing the annual total and cumulative total amounts of such claimed costs. This summary sheet spans some four years, 1987 through 1990, but includes no supporting documentation in the form of canceled checks or receipts. The Division points out that some of the entries on the summary sheet, such as "outside labor," "repairs," and "miscellaneous," are unclear and that other claimed costs, such as "survey" and "architectural" appear duplicative. Included in the list of costs is "advertising." The record does not reveal whether such cost was incurred to advertise the condominium units for sale or rather was incurred for some other purpose.

SELLING COSTS--\$261,426.00

22. Petitioner seeks to include \$261,426.00 as a cost of the project based on the amounts which would have been paid to a selling force of real estate agents to market the condominium units. Specifically, petitioner argues that it did not hire a broker or selling agents, but rather that the three individuals (Ms. Pazer and Messrs. Sorrentino and Martinelli) did all of the selling of the units in order to save expense, generate income and make a profit. On this item, Mr.

Sorrentino testified that “[w]e sold this out with a zero cost. We sold it ourselves. That’s why we put in seven days a week. There is no cost on any of these bills that state for selling units.”

Petitioner admits that no payment was made to the three individuals for such services, but asserts that the necessary work was performed, and that petitioner should be able to include as a cost the customary selling fee for such work. Ms. Pazer and Mr. Sorrentino admitted that they did not report receiving any income from petitioner on their individual income tax returns in connection with their selling activities, nor did petitioner claim any related deduction on its corporate tax returns for any such commission selling expense. Petitioner states, however, that such fee is typically six percent of the selling price of a unit, and thus calculates the claimed cost as \$261,426.00, being six percent of the \$4,357,000.00 total sales price for the units.

23. The Division disallowed petitioner’s claim for selling costs on the basis that payment for the same was simply not, in fact, made. The Division states that since petitioner did not incur the cost, it is not entitled to claim such cost in reduction of its gain on the project.

CONCLUSIONS OF LAW

A. During the time period at issue herein, Tax Law Article 31-B provided for the imposition of a tax, commonly known as the “gains tax,” at the rate of 10 percent upon gains derived from the transfer of real property within the State of New York (Tax Law former § 1441). Tax Law former § 1440(3) defined “gain” as:

the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.

B. Tax Law former § 1440(5)(a), as in effect during the time period at issue, provided, in pertinent part, as follows:

‘Original purchase price’ means the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property, including solely those costs which are customary, reasonable, and necessary, as determined under rules and regulations prescribed by the [Commissioner of Taxation], incurred for the construction of such improvements.

C. There is no dispute that petitioner’s project, the construction and sale of some 32 condominium units, was subject to the gains tax. Furthermore, there is no issue as to the amount of total consideration received by petitioner for the sale of the units. Rather, the issue presented in this case is the dollar amount of petitioner’s OPP. Petitioner claims to have incurred expenses which the Division improperly refused to allow as part of OPP, thereby resulting in an overstatement of petitioner’s gain and its gains tax liability on the project. The specific expense items, as detailed above, are acquisition expense paid to Ms. Pazer and Mr. Sorrentino for the property, construction supervisory fees allegedly paid to Ms. Pazer, Mr. Sorrentino and Mr. Martinelli, indirect expenses allegedly incurred in connection with the project, and fees in the nature of brokerage commissions admittedly not paid, but allegedly representing the value of services performed by petitioner’s three shareholders in selling the condominium units.

D. Petitioner’s claim that it is entitled to “step-up” its OPP by the full \$990,000.00 amount it paid to Ms. Pazer and Mr. Sorrentino for the property is rejected. Ms. Pazer and Mr. Sorrentino owned the property as tenants in common, until June of 1989 when they transferred the property to an entity, petitioner, of which they each owned one-third. The Division, in turn, properly “looked through” this transfer for gains tax purposes and concluded that while there was a change in the identity of the owners of the property, there was no change in beneficial ownership thereof to the extent of two-thirds of the property. Stated differently, after the transfer

to petitioner, two-thirds of the beneficial ownership of the property remained with the same individuals who owned the property immediately prior to the transfer, namely Ms. Pazer and Mr. Sorrentino. Thus, the Division properly computed petitioner's acquisition cost for the property as \$590,333.00, consisting of the \$257,000.00 paid initially by Ms. Pazer and Mr. Sorrentino, plus \$333,333.00 representing the cost of Mr. Martinelli's interest. In so doing, the Division properly recognized the partial change in beneficial ownership to the extent of Mr. Martinelli's interest, but not the mere change of identity with regard to Ms. Pazer and Mr. Sorrentino's interests (*see, Matter of Shechter*, Tax Appeals Tribunal, October 13, 1994).

E. Petitioner's claim for supervisory fees of \$476,000.00 as part of OPP involves the assertion that each of petitioner's three principals was paid \$172,000.00 for their efforts in carrying out the planning, construction to completion and selling of the project. Unfortunately, several problems exist with respect to this claim. First, there is no clear breakdown or informational trail explaining how the precise figure of \$172,000.00 was arrived at. There is testimony that there was discussion at some point that each person would take about \$150,000.00 to \$200,000.00, depending on the length of time the project took to complete. In comparison, petitioner's expert witness calculated a figure for three supervisors on a like sized project of some \$235,000.00 per year. While this may support an argument that the amount claimed by petitioner in supervisory fees for this project is low and thus should be viewed as reasonable, there remains the gap in explaining how the parties arrived at \$172,000.00 each. Further clouding the issue is the fact that the supervisor's agreement was executed during the selling phase as opposed to the construction period for this project. In addition, the supervisory agreement, allegedly memorializing an oral understanding arrived at among the three shareholders near the outset of the project, does not include Mr. Martinelli at all in its terms. In

fact, the only other written evidence of supervisory fees to be paid appears in the joint venture agreement where Mr. Martinelli is to receive \$40,000.00 for his construction activities. The Division, for its part, allowed this amount as part of petitioner's OPP.

In addition to the foregoing, the claim for the supervisory fees, described as for "doing everything" in connection with the project including, apparently, selling the units, is not distinguished from the claim, discussed below, for costs in the nature of brokerage fees for selling the units. It would appear that such latter costs could be, at least in part, duplicative of the fees sought for supervision. Finally, petitioner claims that the relevant amounts appear on its corporate tax return, on the described trial balance, and are carried forward on the joint venture's Form 1065 partnership return, at least for Ms. Pazer and Mr. Sorrentino. However, these amounts are consistently listed as "loans payable," rather than as supervisory fees or supervisory fees payable. Again, there is no tie in to any payment to Mr. Martinelli, nor any evidence of an obligation to pay him \$172,000.00. In this regard, the listing of \$172,000.00 payable to JJR does not relate in any apparent fashion to Mr. Martinelli, other than that the dollar amount is the same as that claimed for supervisory fees. Similarly, there is no explanation as to why the amounts for Ms. Pazer and Mr. Sorrentino would be paid through the joint venture as opposed to outright to them by petitioner per the supervisory agreement. Given these inconsistencies, it cannot be concluded that petitioner has clearly established entitlement to increase its OPP by the amount of \$476,000.00 for supervisory fees. Petitioner's presentation of an after-the-fact agreement for a specific amount, not otherwise detailed as to calculation and omitting all mention of one of the alleged recipients, together with the lack of clear accounting for the amounts sought, does not suffice to carry petitioner's burden. Petitioner's principals chose to carry out the project themselves and, with respect to their own compensation, might have awaited a determination of

how profitable the project would turn out to be. Such a possible wait and see, or after-the-fact, determination of fees in reduction of profits, together with all of the noted inconsistencies, inures against petitioner's claim that construction supervisory fees totaling \$476,000.00 should be allowed. Accordingly, such claim is denied.

F. Petitioner's claim for indirect costs is backed by a single summary sheet together with petitioner's assertion that all of these costs were incurred in fact, on the Rochelle Court project, which was petitioner's only project, and were substantiated by presentation of checks and invoices at the time of audit. Unfortunately, the information provided does not suffice to establish entitlement to these claimed additional costs missed by petitioner's original accountant. The summary sheet presented in evidence spans four years, and includes cost categories, but provides no cost item details. As to substantiation, review of the audit work papers in evidence reveals the Division allowed some \$625,990.00 in claimed costs per petitioner's gains tax filings as being reasonable notwithstanding a lack of documentary substantiation for such costs. Moreover, the summary sheet leaves open the question of whether some of the claimed costs were general and administrative costs or maintenance costs as opposed to capital improvement costs. For example, "water" and "sewer" expenses incurred in 1989 and 1990 could be annual fees as opposed to capital costs of the project. So too, "repairs" would not qualify, by its own terminology, as an allowable capital project cost. "Commissions" expense in 1990 is unexplained, but would appear to run counter to petitioner's claim for expenses in the nature of broker's fees (*see*, Conclusion of Law "G"). Finally, the summary sheet lists "construction interest" of \$84,174.00, in addition to construction interest of \$147,807.00 allowed per audit, and "survey and architect" expense of \$38,670.00 in addition to survey and architectural fees totaling \$62,855.00 allowed per audit. The evidence at hearing provides no explanation as to the source

or purpose of the financing giving rise to the additional claimed construction interest expense, or the timing and purpose for the additional claimed survey and architectural expenses. Without more, petitioner simply has not carried its burden of establishing entitlement to the additional claimed costs and the same are therefore denied.

G. Petitioner's claim for selling costs equal to six percent of the consideration for the project is denied. While presented as a request to include such amount in OPP, the same actually represents a request to reduce consideration received by an amount akin to brokerage fees. In fact, Tax Law former § 1440(1)(a) provided that consideration could be reduced to the extent of "any customary brokerage fees related to the transfer *if paid* by the transferor. . . ."⁴

While petitioner's three principals carried out the sales of the units, it is acknowledged that they were not "paid" and did not receive any specific fees from petitioner for doing so. Tax Law former § 1440(1)(a) plainly requires that such amounts be *paid*, and in this case they were not. By choosing to "sell the project themselves in order to save every penny," the three individuals increased petitioner's profit to the extent of brokerage fees saved. The choice to self-sell, made for legitimate business reasons, but with no payments made by petitioner for such selling activities, cannot now be recast as brokerage fees for the purpose of reducing petitioner's gains tax liability.

H. In view of the fact that petitioner has not prevailed on any of the costs sought to be included in OPP, and thus is not entitled to a refund but rather continues to owe a liability, there is no basis upon which to grant interest to petitioner as requested.

⁴ Whether viewed as a cost includable in OPP or as a brokerage fee in reduction of consideration, the result is numerically the same, for either an OPP increase or a consideration decrease serves to reduce the difference between consideration and OPP, hence decreasing the gain subject to tax, and ultimately decreasing tax liability.

I. The petition of Pasor Development Corp. is hereby denied and the Notice of Determination dated September 30, 1996, as reduced pursuant to the BCMS conference order to the amount of \$11,300.00 plus interest, is sustained.

DATED: Troy, New York
September 9, 1999

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE